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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

THE TOBACCO INSTITUTE, INC., THE AMERICAN TOBACCO CO., BROWN & WILLIAMSON TOBACCO CORP., LARUS & BROTHER CO., INC., LIGGETT & MYERS INC., THE LORILLARD CO., PHILIP MORRIS INC., R. J. REYNOLDS TOBACCO CO., and UNITED STATES TOBACCO CO.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *Respondents.*

REPLY BRIEF FOR PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1036

THE TOBACCO INSTITUTE, INC., THE AMERICAN TOBACCO CO., BROWN & WILLIAMSON TOBACCO CORP., LARUS & BROTHER CO., INC., LIGGETT & MYERS INC., THE LORILLARD CO., PHILIP MORRIS INC., R. J. REYNOLDS TOBACCO CO., and UNITED STATES TOBACCO CO., *Petitioners,*

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *Respondents.*

REPLY BRIEF FOR PETITIONERS

We agree with the suggestion of the Solicitor General that the Court may appropriately defer ruling on the present petition until after it decides *Red Lion Broadcasting Co.* v. *United States,* No. 2, and *United States* v. *Radio Television News Directors Ass'n,* No. 717. However, we disagree with the Solicitor General's contention that the present petition can be disposed of in any event without plenary review. If the Court holds in Nos. 2 and 717 either that the Federal Com-

munications Commission lacks statutory authority to adopt and implement the "Fairness Doctrine," or that the doctrine is violative of the First Amendment, then the judgment in the present case cannot remain standing. On the other hand, if the Court sustains the position of the Commission in those cases, we submit that plenary review of this case should be had because the issues involved here go far beyond the questions raised in *Red Lion* and *News Directors*.[1]

1. The Solicitor General argues that in this case, unlike the "personal attack" cases, there is no "requirement that a particular individual be given broadcast time." (Br. in Opp., p. 14.) This distinction is without constitutional significance. It is not the designation of a particular spokesman who must be accorded time but the dictation of required *content* by the FCC which contravenes the First Amendment. In the "personal attack" situation, the broadcaster's obligation is fulfilled if he simply affords the person attacked a reasonable opportunity to present whatever that person deems to be an appropriate reply. Under the present ruling, on the other hand, the broadcaster is obliged to present free of charge a particular prescribed message—*i.e.*, that smoking may be a health hazard. It is small comfort that the broadcaster may have some leeway in formulating the precise phraseology. Inexorably, the message, which is the "party line" taken by some federal agencies on the smoking-and-health issue, must be presented. And it must be presented *by the broadcaster himself*, unless he is able to find someone else to do so. As the Solicitor General ac-

[1] Once those cases are decided, we would propose to discuss their applicability to the present case in a supplemental brief filed pursuant to Rule 24(5) of this Court.

knowledged in the oral argument in this Court in *News Directors,* a rule whereby "the licensee [is] required himself to broadcast information of a certain kind" would present "a harder question." (Arg. Tr., p. 74.)[2] In these respects, the FCC in the present situation has abdicated the role of "town meeting moderator," to which the Solicitor General analogized its position in his oral argument in *Red Lion.* As the Solicitor General pointed out, such a moderator "does not force anyone to speak. When someone wants to speak, he does not tell him what to say." (Arg. Tr., April 2, p. 29.)

2. The Solicitor General also notes that in the present case, unlike the "personal attack" cases, "there is no . . . obligation of notification and provision of transcripts." (Br. in Opp., p. 14.) Presumably, this consideration bears on the extent of the burden imposed upon broadcasters by the FCC. In the argument in *News Directors,* responding to Mr. Justice White's question whether "it would change your argument any if it appeared that . . . a large amount of the regular content of television broadcasts were covered by these rules," the Solicitor General stated, "Why, yes, of course, Mr. Justice. The extent of the burden would be a matter for consideration . . . ." (Arg. Tr., p. 12.)

Plainly, the cigarette ruling imposes heavier burdens on broadcasters than either the "Fairness Doctrine" or the "personal attack" rules. The obligations there are infrequent and episodic; here they are continual and regularly recurring. The broadcaster must devote

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[2] "Arg. Tr." refers to the transcripts of the oral arguments in *Red Lion* and *News Directors* on April 2 and 3, 1969, prepared by Alderson Reporting Company, copies of which are on file in the Library of this Court.

"a significant amount of time each week" to propagating the anti-smoking message.[3] Unlike the situation in *Red Lion* (see Arg. Tr., April 3, p. 34), the FCC has ruled in this case that the broadcaster cannot fulfill his obligation simply by utilizing time which he has otherwise set aside for public service messages. (Memorandum Opinion and Order, App. A, p. 75, n. 25.)[4] And, in its first decisions implementing the present ruling, which were released on March 26, 1969, after the present petition was filed, the FCC held that its ruling as to cigarettes requires broadcasters to devote not just any time but significant amounts of "prime time"—*i.e.*, 7:30 p.m. to 11:00 p.m.—to anti-smoking messages.[5]

3. The Solicitor General states that there is no uncertainty in this case "as to when the reply obligation arises." (Br. in Opp., p. 14.) This categorical statement is unfounded.[6] Moreover, there is considerable

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[3] As we pointed out in our Petition, cigarettes are not unique among products advertised on radio and television in being the subject of a health or safety controversy regarding their normal use. (Pet., pp. 21-23.) But even if, contrary to our submission, the present ruling could be validly confined to this product, the "uniqueness" of the ruling in no way gainsays its enormous impact on the daily operations of broadcasters.

[4] "App." refers to the separately bound Appendix to the Petition for Certiorari in this case.

[5] *In re National Broadcasting Co.*, FCC Docket Nos. 69-270 and 69-271; *In re Metromedia, Inc.*, FCC Docket No. 69-272.

[6] There is presently a heated dispute within the FCC itself over whether "billboard" announcements—*e.g.*, "This program has been brought to you by [a particular brand] the cigarette with real tobacco taste"—constitute "cigarette advertisements" for purposes of evaluating stations' performance under the present rule. See dissenting opinions of Commissioner Johnson in the *NBC* cases, *supra*, n. 5.

uncertainty as to the magnitude of the obligation imposed by the present rule. At the risk of losing their licenses, broadcasters are left to speculate whether the FCC will consider that the amount of time they devote each week to anti-smoking programs is "significant" enough. In rulings released on March 26, 1969, the FCC admonished a number of broadcasters, which the Commission acknowledged had all "made substantial efforts to meet [their] obligations," that "greater effort is called for." The Commission did not specify how much "greater effort" it wanted, but it instructed the stations to submit, within sixty days, "a statement of your future policies in this area, and, within four months, "a report of your efforts to implement such policies."[7] Obviously, the scope of the present regulation is as least as uncertain as that of the "personal attack" rules.

4. Finally, the Solicitor General states that this case is different from Nos. 2 and 717 on the ground that product advertising "has had a limited status under the First Amendment." (Br. in Opp., p. 15.) Whatever its validity, this proposition cannot seriously be advanced in the present context—where the FCC's opinion, the decision of the Court of Appeals, and the Solicitor General's argument proceed from the premise that cigarette advertisements are tantamount to "discussions" and the presentation of a point of view concerning a controversial issue of public importance. (See Br. in Opp., pp. 13-14.)

Far from having a "limited status," under the present ruling, cigarette advertising triggers a reply obligation substantially more pervasive than any "personal attack" or genuine "discussion" ever has.

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[7] See n. 5, *supra*.

CONCLUSION

For the foregoing reasons and those set forth in our Petition for Certiorari, we respectfully submit that, should this Court rule in *Red Lion* or *News Directors* that the "Fairness Doctrine" or the "personal attack" policy violates that First Amendment or exceeds the FCC's statutory authority, it would follow that the ruling in the present case must be reversed. Even if the Court upholds the FCC in Nos. 2 or 717, however, plenary review of the significantly farther-reaching requirement in this complementary case is fully warranted.

Respectfully submitted,

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